

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Robert V. Towle

v.

Civil No. 12-cv-254-PB

Coos County Superior Court¹

REPORT AND RECOMMENDATION

Proceeding pro se and in forma pauperis, pretrial detainee Robert V. Towle has filed a petition for a writ of habeas corpus (doc. no. 1), seeking relief from certain pretrial orders imposed by the Coos County Superior Court ("CCSC") in Towle's pending state criminal proceedings.² The matter is before this court for preliminary review to determine whether Towle's claims are facially valid and cognizable in a federal habeas action. See Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("§ 2254 Rules"); United States

¹The proper respondent in this case is the Superintendent of the Carroll County Department of Corrections, the facility in which Towle is presently incarcerated. Because the court recommends the petition be dismissed on other grounds, there is no present need to require Towle to amend his petition to name the proper respondent.

²Towle has also filed a motion seeking a preliminary injunction (doc. no. 3) which has not at this time been referred to the magistrate judge for consideration.

District Court District of New Hampshire Local Rule ("LR") 4.3(d)(2) (magistrate judge conducts preliminary review of initial filings by inmates to determine, among other things, whether the filing states any claim upon which relief might be granted).

Background

I. Procedural Background

A. State Criminal Charges

Towle was initially indicted and charged with possession of child pornography on August 14, 2006, and was granted personal recognizance bail pending trial. On December 8, 2006, Towle pleaded guilty and was sentenced to 3 ½ - 7 years in prison. On February 9, 2010, the New Hampshire Supreme Court ("NHSC") reversed that conviction and remanded the matter to the superior court for retrial.

In 2008, while Towle's appeal of the child pornography charges was still pending, Towle was indicted on four counts of aggravated felonious sexual assault and related counts of criminal liability for the conduct of another. The superior court again granted Towle personal recognizance bail. On January 27, 2010, approximately two weeks before the child

pornography convictions were reversed, Towle was convicted of the sexual assault charges. On March 4, 2010, several weeks after the child pornography charges were reversed, Towle was sentenced to 57-114 years on the sexual assault charges.

Although the state initially sought to reprosecute Towle on the child pornography charges, it decided to nol pros those indictments on May 10, 2010, due to Towle's receiving a lengthy prison sentence on the sexual assault charges. Towle asserts that the superior court judge allowed the nol pros over Towle's objection, as Towle wanted to have a trial at which he could be exonerated of the possession charges.

On December 14, 2011, the NHSC reversed Towle's sexual assault convictions and remanded the case to the superior court for a retrial. On December 15, 2011, the prosecutor in the sexual assault case made a public statement indicating that he was disappointed in the NHSC's decision and would seek high cash bail in order to keep Towle "behind bars" pending his retrial on the sexual assault charges. When Towle was rearraigned on those charges, he was held on cash bail pending trial.

Apparently in response to the reversal of Towle's sexual assault conviction, the state reindicted Towle on the child pornography charges. Towle was arraigned on those charges on

March 1, 2012, almost six years after they were initially brought and twenty-two months after they had been nol prossed. The superior court set cash bail on those charges as well.

B. State Court Litigation

Since December 2011, Towle has been held pretrial on the sexual assault charges, and has been held on the child pornography charges since March 2012, unable to post bail in either case. Since being so detained, Towle has filed several motions in the state courts relevant to this federal habeas action, specifically: (1) a motion to recuse two judges whom, he alleges, have demonstrated bias by, among other things, setting cash bail on his cases after they were remanded; (2) a motion to reduce bail to personal recognizance; and (3) a motion to dismiss the child pornography charges based on a speedy trial violation. Each of these motions was denied by the superior court.

On April 19, 2012, Towle filed a petition for a writ of habeas corpus and a petition for original jurisdiction in the NHSC. On June 6, 2012, Towle filed a motion for injunctive relief in the NHSC. On June 11, 2012, the NHSC denied the habeas petition and the motion to exercise original jurisdiction, mooted the motion for injunctive relief. See In

re Towle, No. 2012-272 (N.H. June 11, 2012) (denying petition for original jurisdiction and deeming motion for injunctive relief to be moot).

II. Federal Habeas Claims

Towle now files this habeas petition (doc. no. 1). After careful review of the petition, the court finds that it asserts the following claims for relief:

1. Towle is illegally incarcerated in violation of the Eighth Amendment's prohibition of excessive bail, where the superior court originally granted Towle personal recognizance bail, but later set cash bail when Towle's convictions were reversed and the charges remanded, as Towle's circumstances relevant to bail had not otherwise changed.

2. Towle is illegally incarcerated pending trial on child pornography charges because the trial court allowed the state to nol pros the case over Towle's objection, and then reindict Towle twenty-two months later on the same charges, in violation of Towle's Sixth Amendment right to a speedy trial.

3. Towle is illegally incarcerated pretrial in violation of his Fourteenth Amendment due process right to an impartial judge, because two superior court judges who have issued rulings in his case are biased against him.

The relief sought by Towle through his federal habeas petition includes a request for a declaratory judgment that the state superior court lacks jurisdiction over the pending prosecutions.

Discussion

I. Standard for Preliminary Review of Habeas Petition

The court is required to promptly examine an inmate's habeas petition to determine whether the petition, on its face, states a cognizable claim for relief. See § 2254 Rule 4; see also § 2254 Rule 1(b) (allowing court to apply § 2254 rules to habeas corpus petitions not filed under § 2254). "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judged must dismiss the petition." § 2254 Rule 4. In making this determination, the court must construe the petition liberally. Cf. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (court must construe pro se complaint liberally). To survive preliminary review, the petition must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); Sepúlveda-Villarini v. Dep't of Educ., 628 F.3d 25, 29 (1st Cir. 2010).

II. Pretrial Federal Habeas Relief

"With the notable exceptions of cases involving double jeopardy and certain speedy trial claims, federal habeas relief,

as a general rule, is not available to defendants seeking pretrial review of constitutional challenges to state criminal proceedings.” In re Justices of the Super. Ct. Dep’t of the Mass. Trial Ct., 218 F.3d 11, 19 (1st Cir. 2000) (citing Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 489 (1973)).

“[F]ederal courts have routinely rejected petitions for pretrial habeas relief,” as considerations of comity require federal court abstention where a criminal defendant seeks “to derail a pending state criminal proceeding.” In re Justices, 218 F.3d at 18 (internal quotation marks and citations omitted). An exception to the general rule prohibiting pretrial habeas relief exists where petitioner claims a violation of his right to a speedy trial, and where the requested relief is an immediate trial, not dismissal of the charges. See id. at 17 n.5 (citing Braden, 410 U.S. at 489-90).

Towle’s claims, numbered Claims 1 and 3 above, alleging constitutional violations based on excessive bail and biased judges, are not excepted from the general prohibition against pretrial habeas actions. See In re Justices, 218 F.3d at 18. These claims are therefore not properly before the court in a pretrial habeas action.

Towle's speedy trial claim, numbered Claim 2 above, seeks an order from this court declaring that the superior court lacks jurisdiction over his criminal case. The relief Towle seeks is tantamount to a request that this court direct dismissal of the state prosecution. The relief sought by Towle cannot be provided without derailing the state criminal proceeding, and the claim at issue does not fall within the limited speedy trial exception to the general rule prohibiting pretrial habeas relief. Because Towle has not asserted any claim upon which relief can be granted at this time, the court recommends that the petition be dismissed without prejudice to refiling at "a time when federal jurisdiction will not seriously disrupt state judicial processes." See id. at 18 (internal quotation marks and citation omitted).

Conclusion

For the foregoing reasons, the court recommends that Towle's habeas petition (doc. no. 1) be dismissed without prejudice. Any objections to this report and recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d

52, 57 (1st Cir. 2011), cert. denied, 132 S. Ct. 1045 (2012);
Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564
(1st Cir. 2010) (only issues fairly raised by objections to
magistrate judge's report are subject to review by district
court; issues not preserved by such objection are precluded on
appeal).

A handwritten signature in black ink, appearing to be 'Landya McCafferty', written over a horizontal line.

Landya McCafferty
United States Magistrate Judge

August 7, 2012

cc: Robert V. Towle, pro se

LBM:jba